STATE OF MICHIGAN

COURT OF APPEALS

JAMES W. ZERRENNER,

Plaintiff-Appellee,

v

BONNIE S. ZERRENNER,

Defendant-Appellant.

UNPUBLISHED
February 2, 2001

No. 219301
Kent Circuit Court
LC No. 97-010967-DO

Before: O'Connell, P.J., and Zahra and B. B. MacKenzie,* JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce, challenging certain provisions of the judgment. We affirm in part, reverse in part, and remand for further proceedings.

In a divorce action, the trial court must make findings of fact and dispositional rulings. On appeal, this Court will uphold the factual findings unless they are clearly erroneous. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993); *Quade v Quade*, 238 Mich App 222, 224; 604 NW2d 778 (1999). A dispositional ruling, however, is discretionary and will be affirmed on appeal unless this Court is left with the firm conviction that the ruling was inequitable. *Sparks v Sparks*, 440 Mich 141, 146-152; 485 NW2d 893 (1992).

Property Distribution

Defendant argues that portions of the trial court's distribution of the marital estate was inequitable. In particular, defendant contends that the trial court erred by excluding the value of plaintiff's law firm and his pension plan from the marital estate. Distribution of property pursuant to a divorce requires an initial determination of whether a particular asset is a marital asset or a separate asset. *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). The marital estate is composed of those assets that come to "either party by reason of the marriage." MCL 552.19; MSA 25.99. Thus, property earned or acquired by either party during the marriage is presumed to be part of the marital estate, *Byington v Byington*, 224 Mich App 103, 112-113; 568 NW2d 141 (1997), and an increase in value of an asset that one party owned before the marriage may also be added to the marital estate, *Hanaway v Hanaway*, 208 Mich App 278, 294; 527 NW2d 792 (1995).

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Regarding plaintiff's law practice, we hold that the trial court did not err in concluding that it should be excluded from the marital estate. The law practice was begun by plaintiff prior to the parties' marriage and indisputably prospered over the years as a result of plaintiff's exceptional skills as a lawyer. Nonetheless, we are of the opinion that defendant made significant contributions, both pecuniary and non-pecuniary, to the practice, as well as interrupting her own educational goals, entitling her to an equitable claim for restitution, rather than a claim for a portion or percentage of the practice itself. In this respect, we analogize the facts of this case to those cases where a student spouse's attainment of an advanced degree has been furthered by the nonstudent spouse's pecuniary and non-pecuniary contributions, including deferment of that spouse's own career or educational goals. See, e.g., *Postema v Postema*, 189 Mich App 89; 471 NW2d 912 (1991); *Krause v Krause*, 177 Mich App 184; 441 NW2d 66 (1989); *Greaves v Greaves*, 148 Mich App 643, 646-647; 384 NW2d 830 (1986); *Woodworth v Woodworth*, 126 Mich App 258; 337 NW2d 332 (1983); *Moss v Moss*, 80 Mich App 693, 695; 264 NW2d 97 (1978). See also *Sparks*, *supra* at 160 (in distributing assets, a court may consider the interruption of the personal career or education of either party); *Hanaway*, *supra* at 293. In cases where one spouse has earned an advanced degree during marriage, compensation is awarded on equitable grounds with the stated goal of attempting to financially return to the nonstudent spouse what that spouse contributed toward attainment of the degree. Similarly, pursuant to MCL 552.401; MSA 25.136, when one spouse significantly assists in the acquisition, improvement, or accumulation of the other spouse's separate asset, the court may consider the contribution as having a distinct value deserving of compensation. *Reeves*, *supra* at 494-495. Because such an award of compensation is premised upon the concept of restitution, rather than possession by the nonstudent spouse of an interest in the advanced degree itself, the actual value of the degree is irrelevant. *Postema*, *supra* at 103; *Krause*, *supra* at 197-198.

Here, plaintiff's law firm was established in 1976, after he had already been practicing for nearly ten years, whereas the parties' marriage occurred in 1987. Defendant, however, worked as an administrative assistant for plaintiff's firm from its inception through the beginning of their personal relationship in the mid-1980s, and then aborted her college education to return to work for plaintiff in 1989. Although her return to work was on a part-time basis, it continued through the parties' separation in 1997. After she returned to work for plaintiff in 1989, defendant was not paid a salary, FICA taxes were not paid on her behalf, and no pension benefits accrued. Although defendant was allowed to spend a significant amount of the law firm's revenue on herself, there was no evidence to show that she would not have had this money to spend even if she had not worked for the firm. Thus, because the record clearly establishes that defendant actively and significantly contributed to plaintiff's law practice during their marriage, we remand this matter to the trial court to determine a fair and equitable amount of restitution to defendant.

Defendant also contends that the trial court erred by concluding that plaintiff's pension was not part of the marital estate. We agree. Any right to vested pension benefits accrued by a party during the marriage must be considered part of the marital estate subject to award upon divorce. MCL 552.18(1); MSA 25.98(1); *VanderVeen v VanderVeen*, 229 Mich App 108, 110-111; 580 NW2d 924 (1998). Here, plaintiff testified that his pension plan at the time of trial was different than the one he had at the time of the marriage because the latter plan was "cashed" in. There was additional testimony indicating plaintiff's acknowledgment that his pension plan was

part of the marital estate. Accordingly, we conclude that the issue of plaintiff's pension must be re-examined on remand.

Next, defendant argues that the trial court erred by failing to consider the difference in value between the parties' personal property awards when disposing of the balance of the marital estate. The personal property was divided by plaintiff into two lists: list A, with a value of $25,000, and list B, with a value of $55,000. Plaintiff testified that he was willing to take either list, although he preferred list A. Plaintiff also indicated that he was willing to take list A "even up," although he was willing to take list B at the above values. Defendant indicated that she wanted the property in list A.

The trial court ruled that defendant was entitled to the personal property included in list A, but refused to consider the difference in values, opining that, "[s]ince defendant was given the choice without any demand by plaintiff that he be awarded the difference in values, the Court will not consider defendant's request [for one-half the difference in value]." We do not believe that plaintiff's indication that he was willing to take a loss in value, based on his own assigned values, is binding on defendant. Moreover, defendant's assent to the personal property division indicated that she was willing to take list A "at a price of $25,000," or the property could be sold and the proceeds divided. Regardless, defendant was entitled to an equitable distribution of the marital estate, independent of her acceptance of any specific items. See generally *Quade*, *supra*, 224. In the absence of any stipulation by defendant to the waiver of the values plaintiff assigned to the personal property lists, we conclude that the trial court erred by failing to consider the difference in value between the personal property on the two lists.

Defendant also contends that the trial court erred by assigning a net equity value to the marital home that did not take into consideration the sales commission payable upon its court-ordered sale. Although defendant indicated that her position was that the equity was $122,000 based on the costs associated with a sale, defendant did not request that the trial court consider the costs of sale or introduce any evidence to permit a proper calculation of such an expense. Accordingly, we could refuse to consider this issue. *Kosch v Kosch*, 233 Mich App 346, 353-354; 592 NW2d 434 (1999).

Nevertheless, on its merits, defendant's claim must fail. The trial court's equity calculation was based on evidence indicating that the marital home was appraised at $525,000 and had an outstanding mortgage of $361,000. Thus, the trial court properly concluded that the equity was $164,000. The failure to consider the costs of sale is further supported by the testimony indicating that the house was listed for sale at $579,000, and plaintiff's additional payments contribute to an even higher equity figure. In sum, we are not left with a clear or definite conviction that any mistake occurred as to this issue.

Defendant also contends that the trial court erred by failing to assign a value to the "Ransom property," an office building owned by plaintiff before the marriage. As stated above, an increase in value of an asset that one party owned before the marriage may be added to the marital estate. *Hanaway*, *supra* at 294. Here, conflicting evidence was presented regarding the value of the Ransom property. Plaintiff's own testimony indicated that his share was worth

between $45,000 and $60,000, although he also indicated that he was willing to give the property to defendant.[1] Neither party presented any evidence as to the value of the Ransom property at the time of the marriage. While we disagree with the trial court's finding that the Ransom property was "valueless," there is no evidentiary basis for us to conclude that the trial court erred by not finding a sum certain increase in value. That is, absent any testimony regarding an increase in value during the marriage, we are unable to conclude that the trial court erred by assigning a zero value to the asset.

While a trial court's distribution of a marital estate need not follow any precise mathematical formula, any significant departures from congruence must be explained clearly by the court. *Byington, supra* at 114-115. In reaching an equitable division of the marital estate, the factors to be considered, and their significance, will vary depending on the facts of a given case. A nonexhaustive list of factors includes the duration of the marriage, the contribution of each party to the marital estate, each party's age, health, and station in life, each party's earning ability and needs, fault or past misconduct, and any other equitable circumstance. *Sparks, supra* at 160-161. The trial court need not place equal weight on each factor where the circumstances indicate otherwise. *Byington, supra* at 114.

Here, given the parties' ten year marriage, the significant discrepancy in the parties' income levels, defendant's unrewarded contributions toward the parties' marital estate, and the alleged lack of fault on the part of either party, we conclude that the trial court's property distribution is an abuse of discretion and is inequitable. *Sparks, supra.* Accordingly, we remand for a redetermination of the disposition of marital estate in accordance with this opinion.

Alimony/Spousal Support

Defendant challenges the trial court's modification of the terms of the spousal support award after the court had issued its post-trial written opinion. As with dispositional rulings regarding property distribution, an award of spousal support is discretionary and will not be disturbed on appeal unless this Court is left with the firm conviction that the ruling was inequitable. *Sparks, supra* at 146-152.

Here, trial was held in November 1998 and the trial court issued its written opinion in January 1999, awarding defendant "alimony in gross" in monthly installments of $2,400 for three years. The stated purpose of the award was "to aid defendant in her request for completion of her college education and for her general maintenance. . . ." The court's opinion directed plaintiff's counsel to prepare a proposed judgment of divorce in accordance with the opinion. Plaintiff's counsel prepared a proposed judgment and submitted it under the seven-day rule. MCR 2.602(B)(3). Defendant's counsel filed objections to the proposed judgment and also moved for clarification of certain issues. Following a hearing, the trial court clarified and modified its earlier award of alimony in gross by adding provisions to the judgment that (1) made the monthly installments contingent on defendant's survival, (2) for federal income tax purposes, made the "support in gross" taxable income for defendant pursuant to § 71 of the Internal Revenue Code

[1] We note that this promise was illusory in light of plaintiff's partnership structure.

(26 USC 71), and tax deductible for plaintiff pursuant to § 215 of the IRC (26 USC 215), and (3) made the alimony non-modifiable by either party.

To the extent that defendant challenges the procedure used by the trial court in modifying its earlier written opinion, we find no error. MCR 2.602(B)(3). Accord, *Hessel v Hessel*, 168 Mich App 390, 396; 424 NW2d 59 (1988). However, to the extent that defendant argues that the trial court's modification altered the basic nature of the award from "alimony in gross" to periodic alimony, and reduced the award's long-term value to defendant, we agree and remand. The court's attempt at clarification only muddied the waters further.

Recently, this Court has explained that the term "alimony in gross" is misleading inasmuch as it is "not really alimony intended for the maintenance of a spouse, but rather is in the nature of a division of property." *Staple v Staple*, 241 Mich App 562, 566; 616 NW2d 219 (2000). Hence, alimony in gross is considered final and exempt from modification under MCL 552.28; MSA 25.106, even though the recipient spouse dies or remarries before all the payments are made. *Id.*[2] Here, although the trial court expressly denominated the award as "alimony in gross" or "spousal support in gross," the subsequently added contingency and tax provisions are inconsistent with a division of property in the marital estate. Because an "alimony award goes hand in glove with the property distribution," we remand this issue to the trial court for reconsideration in conjunction with its re-evaluation of an equitable division of property. See *Jansen v Jansen*, 205 Mich App 169, 172; 517 NW2d 275 (1994); *Magee v Magee*, 218 Mich App 158, 165-166; 553 NW2d 363 (1996).

Attorney Fees

Defendant next argues that the trial court abused its discretion in awarding her a fraction of her claimed attorney fees. We agree. A party in a domestic relations matter who is unable to bear the expense of attorney fees may recover reasonable attorney fees if the other party is able to pay. MCR 3.206(C)(2); *Kosch*, *supra* at 354. While we acknowledge that both parties in this matter are *able* to bear the expense of incurred attorney fees, we nevertheless conclude that, given the unique factual circumstances of this case, defendant is entitled to an award of attorney fees from plaintiff. Defendant's pretrial brief requested $13,000 in fees, and, with little elaboration, the trial court awarded one-half that amount or $6,500. We find this award to be an abuse of discretion given that (1) plaintiff is himself an experienced lawyer and received free representation as a professional courtesy, (2) plaintiff initiated the divorce, (3) the disparity in the parties' income levels is substantial, (4) the court did not award defendant any substantial, liquid asset from which she could pay the fees, and (5) the award did not include fees incurred during trial or post-trial matters. On remand, the trial court is directed to consider this issue anew.

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[2] We cite *Staple* for the limited purpose of defining the relevant terms of art. The *Staple* Court expressly noted that its holdings regarding modifiability of alimony awards applied only in cases involving negotiated settlement agreements. *Staple*, *supra* at 569. That is not the case here.

Remand Proceedings

Lastly, after reviewing the entire record, we agree with defendant that proceedings on remand be assigned to a different trial judge. See *Daniels v Daniels*, 165 Mich App 726, 733; 418 NW2d 924 (1988). The newly assigned judge has the discretion, after consultation with the parties and their respective counsel, to determine whether proofs should be reopened or whether further briefing is necessary. *Jansen, supra*; *Magee, supra*.

Affirmed in part, reversed in part, and remanded for further proceedings before a different trial judge. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Brian K. Zahra
/s/ Barbara B. MacKenzie